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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS ROJAS,

Defendant and Appellant.

B235368

(Los Angeles County
Super. Ct. No. TA109766)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Ricardo R. Ocampo, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Luis Rojas was convicted of murdering a rival during a period of gangland warfare. On appeal, Rojas challenges the admissibility of evidence regarding the shooting of his gang-member son six days earlier, which was presented to show defendant's vengeful motives. Rojas also claims that the jury failed to follow instructions. We find no error and affirm.

FACTS

Twelve-year-old N.V. witnessed a killing near her home on East 107th Street in Los Angeles on August 9, 2009. Around 1:10 p.m., she heard five gunshots. From a window, she saw "a guy on the ground, people shooting him." There were two gunmen, who fired some 20 shots at the person lying on the sidewalk. After the gunmen left, N.V. went outside. She recognized the victim, Osmin Linares, whom she had seen on several occasions. He was still breathing.

N.V. described the gunmen as Hispanic. One of the shooters had long hair tied in a ponytail. On September 10, 2009, N.V. identified defendant in a photographic lineup. She wrote, "The person I saw shoot Osmin is in photo 5." In court, N.V. identified defendant as the person whose photograph she circled. At a live lineup, she wrote on a form, "I am really not sure if it was No. 2," referring to defendant's position in the lineup, adding above her signature, "He was the one that looked like him, but I wasn't sure." She continued to maintain this position at trial, while admitting that she did not want to be in court.

N.V. expressed fear of defendant on several occasions. During the live lineup, she cried and told the police that she was scared because it seemed like defendant was looking straight at her. N.V.'s older sister was upset with N.V. for participating in the lineup procedure. At the first trial in this case, N.V. told the investigating officer, "I didn't know he was going to be here," referring to defendant. She is afraid that defendant's "family was going to be here, and they can probably do something to me." She would not have come to court if she knew that defendant was going to be there. On cross-examination, N.V. agreed with defense counsel's statement, "So you couldn't say Mr. Rojas is the guy that did it; correct?" She explained that she only saw his "body

type” but not his face. N.V. never made a qualification about “body type” when she identified defendant to the police.

On the day of the shooting, one of N.V.’s neighbors, Maria Castillo, asked Osmin Linares to help her carry items into her home from a moving van. After helping Castillo for 15 or 20 minutes, Linares left. Shortly afterward, Castillo heard many gunshots. She saw Linares lying in the street, choking on his blood.

Linares was still alive when the police arrived, and told an officer that he did not know who shot him. The police recovered over 20 casings or projectiles from .45-caliber and 9-millimeter weapons. The .45-caliber casings were manufactured by Winchester, the same type that were found in a search of defendant’s residence. One of the bullets had “mushroomed,” meaning that the shooter fired straight down. Linares suffered 16 gunshot wounds concentrated to his head, neck, upper chest and the back area, and died from his injuries.

Maria Castillo knows defendant, whose wife was Castillo’s friend and babysitter. Castillo identified defendant in court without hesitation, as she has known him for four or five years. In fact, there were times when Castillo visited defendant’s home “every day.” On August 9, Castillo saw defendant near the shooting site, which “struck me kind of odd, because he hardly ever goes around that area.” She elaborated that “It was kind of strange for him to be there, because I knew that he was not supposed to go into that area.” Defendant and Castillo greeted each other. When she mentioned seeing defendant to her family, her daughter said, “Well, it can’t be him. He is not supposed to come to this vario.”

During her police interview, Castillo told detectives that she saw defendant 15 minutes before the shooting. At trial, Castillo claimed that the shooting was “a long time” after she greeted defendant near the shooting site. She also told the detectives that the person she saw had the number “38” tattooed on his face. Defendant has the number “38” tattooed on his right cheek. Castillo acknowledged in court that this is a gang insignia, and admitted that she is afraid of street gangs, specifically the 38’s. At trial, Castillo unconvincingly attempted to testify that it was some person with an amputated

leg that she saw, not defendant, saying “May I keep quiet?” when questioned whether she was telling the truth.

A police officer who specializes in gangs, Tyson Hamaoka, supervises the activities of the 38th Street gang, whose primary activities are robberies, narcotics and weapons sales and possession, and murder. He testified that their gang insignia is the number “38,” and their rivals are the Hacienda Village Boys (HV Boys). Defendant is an admitted member of the 38th Street gang who goes by the moniker “Big Jap.” The neighborhood where the shooting occurred is controlled by the HV Boys. Osmin Linares was a 15-year-old member of HV Boys. At the time of the shooting, there was a “gang war” between the two groups, whose turf is about 5.5 miles apart.

On August 3, 2009—six days before the shooting of Osmin Linares—Officer Hamaoka went to the scene of a shooting on East 104th Street in Los Angeles. The victim was defendant’s 15-year-old son Jose Rojas, Jr., who was shot multiple times in the back. Defendant’s son, a member of the 38th Street gang, survived the shooting. It is not known whether Osmin Linares is the person who shot Jose Rojas, Jr. The Rojas family lives in HV Boys territory.

Officer Hamaoka opined that the shooting of defendant’s son and the shooting of Osmin Linares six days later were part of the gang war between the 38th Street gang and the HV Boys. The shooting of Linares was committed for the benefit of, at the direction of, and in association with the promotion of the 38th Street gang. Gang members gain increased status by committing heinous and blatant crimes. Here, the crime was blatantly committed in the middle of the day on a busy street, and the victim was shot repeatedly.

Hamaoka testified that gangs retaliate for the shooting of members to avoid being perceived as weak: 38th Street is one of the most powerful gangs in Los Angeles, so it cannot afford to seem weak. A retaliatory shooting contributes to an atmosphere of fear and intimidation in the community. During the summer of 2009, people were afraid to leave their homes due to the gang war, and were scared to testify against gang members for fear of retaliation because they “snitched.” The 38th Street gang instigated the outbreak of violence by murdering an HV Boys member on July 23, 2009. The HV Boys

retaliated by shooting defendant's son on August 3, 2009. The 38th Street gang retaliated by killing HV Boy Osmin Linares on August 9, 2009.

Defendant's wife testified that she, defendant and their children attended a Mass on August 9, 2009, at 1:00 p.m., which lasted for over an hour. Defendant was there the entire time. Before the service began, the priest stood next to defendant for four or five minutes and said a blessing over Jose Jr., who had just been released from the hospital after being shot on August 3. Defendant's son Mark also testified that defendant and the family attended Mass on August 9. When the family returned home from church that day, they saw police activity down the street relating to the shooting of Osmin Linares.

A priest from the Rojas family's church testified that he does not recall seeing defendant at Mass on August 9, 2009. In fact, he could not recall ever seeing defendant, although someone with the number "38" tattooed on his face would be memorable. The priest noted that the church is always filled to capacity, so he does not see everyone. The church bulletin indicated that a Mass would be said in honor of a deceased relative of Mrs. Rojas at 1:00 p.m. on August 9.

PROCEDURAL HISTORY

Rojas pleaded not guilty to a charge of murder while personally using a handgun. His first trial ended with a deadlocked jury voting 11 to 1 for conviction. He was convicted of first degree murder on retrial. The jury found true allegations that he used a handgun to commit the killing, and that he committed the offense for the benefit of, or in association with a criminal street gang. Rojas was sentenced to a term of 25 years to life for the murder plus a consecutive 25 years to life for using a handgun.

DISCUSSION

1. Admission of Evidence Regarding the Shooting of Defendant's Son

Defendant attempted to block the admission of evidence relating to the shooting of his son six days earlier. He reasoned that because this was charged as a gang shooting—not as a personal vendetta—the evidence was not relevant. The prosecution countered that the shooting of defendant's son was strong evidence of motive for defendant to shoot a rival gang member. The prosecution noted that "the fact that the gang would benefit

from the crime, that does not preclude the defendant from deriving some benefit as well.” The court allowed the evidence, finding it “is highly relevant,” its probative value is not outweighed by the prejudicial effect, and it is “intertwined with the gang motivation.”

On appeal, defendant “concedes it to be relevant had a member of HVB shot appellant’s son prior to appellant shooting Linares, a member of HVB. That’s classic retaliation.” According to defendant, there is no evidence that his son was shot by the HV Boys. His brief states, “Since the trial court had no idea who shot appellant’s son during the prior shooting, it could only speculate that the shooter was a member of HVB and thereby render the prior shooting relevant on the issue of motive.” Defendant argues that this was an error of constitutional magnitude, a claim he waived by failing to assert it at trial. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1122; *People v. Davis* (1995) 10 Cal.4th 463, 501-502, fn. 1.)

Contrary to defendant’s argument, Officer Hamaoka did, in fact, testify that “Hacienda Village Boys shot Jose Rojas, Jr.,” with multiple rounds in the back. Although Hamaoka did not identify any suspects in that shooting, defendant did not object that Hamaoka’s testimony was vague or lacked foundation. At trial, defendant accepted it as a given that his son was shot by the HV Boys as part of a war with the 38th Street gang. It is only on appeal that defendant takes issue with the identity of the persons who shot Jose Rojas, Jr.

Evidence of warfare between gangs is relevant to show motive. For example, in *People v. Szeto* (1981) 29 Cal.3d 20, the defendant’s cohorts entered a crowded restaurant in Chinatown “and opened fire on the patrons, intending to revenge themselves on members of two rival Chinese youth gangs . . . but instead killing and wounding innocent bystanders.” (*Id.* at p. 26.) The Supreme Court cited evidence to establish motive: two months earlier, a member of defendant Szeto’s gang was killed in a shoot-out with the two rival gangs. (*Id.* at p. 28.) Although there was no proof that defendant and his cohorts expected to kill the very person who shot their friend two months earlier, the mere occurrence of the earlier killing could be used to explain the motive behind the restaurant massacre.

In this instance, three shootings occurred within less than three weeks: the murder of an HV Boys member on July 23, the shooting of 38th Street member Jose Rojas, Jr., on August 3, and the murder of HV Boys member Osmin Linares on August 9. The jury could reasonably conclude, based on this timeline, that there was a war between the two gangs and that defendant had a motive to shoot Osmin Linares on behalf of the 38th Street gang as revenge for the shooting of his gang-member son, on the belief that the HV Boys shot Jose Rojas, Jr. The excessive number of bullets recovered from Linares's body indicates retributive rage, with the killer shooting directly down into the fallen boy. This was not a random drive-by shooting or a robbery: it was an execution. There was no error in admitting evidence about the shooting of defendant's son to show motive and to prove the gang allegations.

If there was any error in admitting evidence of the shooting of Jose Rojas, Jr., it was harmless because it is not reasonably probable that a different result would have occurred. Defendant was identified by two eyewitnesses as being at or near the shooting site. N.V. identified defendant in a photographic lineup, writing on his photograph that defendant is "the person I saw shoot Osmin" Further, witness Castillo has known defendant for four or five years, and told detectives that she saw defendant at the shooting site 15 minutes before Linares was killed, which struck her as odd: defendant usually does not hang out there because it is HV Boys territory and "I knew that he was not supposed to go into that area." Given that both eyewitnesses expressed fear of testifying against defendant, who is an admitted gang member, the jury could reasonably discount their attempts at trial to discredit the positive identification of defendant they made to detectives when interviewed shortly after the shooting.

2. Jury Instructions

Defendant observes that there were two shooters, one firing a .45-caliber weapon and the other firing a 9-millimeter weapon. Casings and projectiles from both types of guns were collected at the scene. At defendant's home, the police found .45-caliber ammunition. The medical examiner testified that there were 16 bullets in Linares's body,

but he did not specify which type. Defendant now contends that the jury could not have found that any .45-caliber bullets struck Linares or caused his death.

The jury was instructed that defendant's intentional act of firing his gun "caused the death" of Linares.¹ The jury was also instructed that defendant asserted an alibi: "The defendant contends that he did not commit this crime, and that he was somewhere else when the crime was committed." Defendant's family testified that he was attending Mass at the time of the shooting. The court did not instruct the jurors with the bracketed portions of CALCRIM No. 3149, relating to proximate cause.²

Defendant concedes that substantial evidence supports a gun use allegation. He notes that "a defendant who joins with another in firing shots at a victim is a proximate cause of the victim's death even if it is impossible to tell who fired [the] shots that were fatal." In *People v. Sanchez* (2001) 26 Cal.4th 834, 845, a single bullet was the actual cause of death; however, "all parties agreed it could not be established whether defendant or Gonzalez had fired the fatal shot." The court concluded, "Although in this case it could not be determined who was the direct or actual shooter of the single fatal round, the evidence, with all reasonable inferences drawn in favor of the guilty verdicts, supports a finding that defendant's commission of life-threatening deadly acts in connection with his attempt on Gonzalez's life was a substantial concurrent, and hence proximate, cause of Estrada's death." (*Id.* at pp. 848-849.)

¹ The instruction was, "the People must prove that: one, the defendant personally discharged a firearm during the commission of that crime; two, the defendant intended to discharge the firearm; and, three, the defendant's act caused the death of a person." (CALCRIM No. 3149.)

² The portion of the instruction that was not given to the jury reads, "[An act causes [death] if the [death] is the direct, natural, and probable consequence of the act and the [death] would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]" (CALCRIM No. 3149.)

The court has a sua sponte duty to instruct on proximate cause if causation is at issue. (*People v. Bland* (2002) 28 Cal.4th 313, 333-336.) By the same token, even if there was error in failing to give the proximate cause instruction, the error is harmless if “[a] correct instruction on proximate causation could not have aided defendant.” (*Id.* at p. 318.) In *Bland*, “the evidence was not clear as to which of the two, defendant or his cohort, fired the shots that hit each of the three victims” and “the jury could have found the enhancement true without determining that a bullet fired by defendant struck a victim.” (*Id.* at p. 334.) The Supreme Court found that “the court erred in not defining proximate causation.” (*Id.* at p. 335.) However, the error was harmless. (*Id.* at p. 338.) The gun use enhancement in Penal Code section 12022.53, subdivision (d) “does not require that the defendant fire a bullet that directly inflicts the harm. The enhancement applies so long as defendant’s personal discharge of a firearm was a proximate, i.e., a substantial factor contributing to the result.” (*People v. Bland, supra*, 28 Cal.4th at p. 338.)

In this instance, defendant did not wish to highlight to the jury during closing argument that .45-caliber Winchester bullets were found at the scene and at his home, but none was expressly shown to have struck the victim. Instead, he argued that he was at church, and nowhere near the scene of the shooting. Now that he gambled—and lost—on his alibi defense, he claims the jury was improperly instructed or failed to follow instructions. His argument that no .45-caliber bullet was shown to have penetrated the victim is made for the first time on appeal.

Because defendant never contested at trial that the victim died from 16 gunshots from two different caliber guns, he cannot claim that the jury was improperly instructed or failed to follow instructions. Proximate cause was not at issue at trial: the victim died because two gun-wielding men emptied their weapons into him, concentrating on his head, neck, upper chest and back. The only issue at trial was the identity of the shooters. The jury accepted the eyewitness identification of defendant as being one of the shooters.

With 16 gunshot wounds—and over 20 casings or bullets from .45-caliber and .9-millimeter weapons on the ground nearby—the jury could logically infer that defendant

personally and intentionally discharged a firearm, which was a substantial factor causing the death of Osmin Linares. When the jury convicted defendant of first degree murder, it necessarily found that he proximately caused Linares's death. The failure to instruct on proximate cause for the gun use enhancement was harmless error. (*People v. Carrillo* (2008) 163 Cal.App.4th 1028, 1036-1038.)

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.